BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The oral opinion, findings of fact, conclusions of law and written opinion of the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas may be found at R. 276-290. The written opinion of said District Court is reported in 33 F. Supp. 244.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit may be found at R. 301-303, and is reported in 118 F. (2d) 328.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the petition for certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

SPECIFICATION OF ERRORS TO BE URGED.

The errors to be urged are set forth in the petition for certiorari, and for the sake of brevity are not repeated here.

SUMMARY OF THE ARGUMENT.

I.

Tips received by the redcaps from persons using respondent's depot were gifts or gratuities to them, and were their property in the absence of an agreement to the contrary.

II.

The Fair Labor Standards Act did not affect the ownership of the tips so as to make them the property of respondent.

III.

Under the arrangement existing when respondent's notice of October 22, 1938, was served on the redcaps, they had the right to retain all tips received. This arrangement was never changed despite respondent's notice because (a) the redcaps did not accept the plan, but, on the contrary, protested against it, and the parties by their conduct thereafter recognized that there had never been a meeting of the minds thereon, and (b) respondent could not by its unilateral action effect a change in the arrangement in view of the redcaps previous designation of a representative for collective bargaining purposes, and request for a conference to negotiate a collective agreement under the Railway Labor Act.

IV.

Respondent by its notice of October 22, 1938, did not claim ownership of the redcaps' tips. The notice was merely an assertion by respondent of its opinion that tips were wages under the Fair Labor Standards Act, and that it was only bound to make up the difference between the tips received and the minimum wages earned.

V.

The accounting and guarantee plan is not a compliance with the Fair Labor Standards Act because it does not carry out the purposes of Congress since (a) it permits of easy evasion of the obligations imposed thereby, (b) it shifts the burden of keeping records from the employer to

the employee in violation of Section 11 (c) of the Act, and (c) it is conducive to labor disputes burdening and obstructing commerce.

VI.

Tips received by the redcaps were not payment of wages by defendant as required by the Fair Labor Standards Act. The judgment of the Circuit Court of Appeals reversing the judgment of the District Court in favor of the redcaps is, therefore, erroneous.

ARGUMENT.

I.

Tips Received by the Redcaps From Persons Using Respondent's Depot Were Gifts or Gratuities to Them, and Were Their Property in the Absence of an Agreement to the Contrary.

The Circuit Court of Appeals for the Fifth Circuit based its decision on its conclusion that the tips received by the redcaps after October 24, 1938, the effective date of the Fair Labor Standards Act, were the property of respondent, and hence, the retention by the redcaps of these tips—the respondent's property—was payment of wages by respondent. Judge Holmes in his dissenting opinions in this case and the Jacksonville case held, in effect, that the word "tip" should be given its usual and ordinary meaning, that of a gift or gratuity, and that being gifts or gratuities the redcaps had the right to retain the tips for themselves. He was of the opinion that tips were not compensation for service, but rather gifts or gratuities, because whatever moral compulsion one may have been under to tip redcaps, Pullman porters or other employees, there was no legal obligation to do so during the period involved. He agreed with District Judge Atwell, who said (R. 286), 33 F. Supp. 247:

> "The payment of tips by the public, to the employee of another, is a gift to that employee, and in the absence of any contract between the employee and employer that such tips shall be the property of the employer, they remain the property of the employee."

Judge Otis in the case of Harrison etc. v. Kansas City Terminal Railway Company, 36 F. Supp. 434, l. c. 439 (8), held likewise. The dissenting opinion of Judge Holmes, the opinion of Judge Atwell, and the opinion of Judge

Otis follow the only previously reported cases which hold that in the absence of an agreement, tips given by customers to an employee belong to the employee. These previous cases cited in a note in 13 A. L. R. 921 are Polites v. Barlin (1912), 149 Ky. 376, 41 L. R. A. (n. s.) 1217, 149 S. W. 828; Zappas v. Roumeliote, 156 Iowa 709, 137 N. W. 935, and McRae v. McBeath, 5 N. B. 446. Much doubt is cast on the correctness of the majority opinion in this case in view of its conflict with the previously decided cases holding that tips are the property of an employee in the absence of a contrary agreement.

The majority opinion proceeds on the theory that since the tips would not have been given the redcaps unless they performed a service for the donor, the tips are essentially compensation for services rendered by respondent through the redcaps, and not gifts, and hence are the property of the respondent. Judge Holmes, dissenting, however, takes the position that the tips were gifts, since there was no legal obligation to tip at all. The majority opinion ignores the fact that in the case of every gift, there is in a non-legal sense a legal consideration, that is, a reason for its being made, whether it be love, affection, a past favor, or a desire on the part of the donor to favor the donee, but it is the absence of a **legal** consideration which the courts have in mind when they say a gift implies want of consideration. The courts have held that a tip is a gift or gratuity not founded on any legal consideration. Thus, in Booker v. Pennsylvania Railroad, 82 Pa. Super. 588, the Court said:

> "The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which he was not bound to give, and which the porter could not have recovered in an action of assumpsit if the passenger had not seen fit to give it."

And in Powers' Case, 275 Mass. 515, 176 N. E. 621, the Court said:

> "As to each customer of the employer, the tip to the employee was a gift and not founded on an obligation."

Petitioner respectfully submits, therefore, that the Circuit Court of Appeals erred when it held that tips were not gifts or gratuities to the redcaps, and that since they were such, the tips were the property of the redcaps in accordance with the intention of the donors.

II.

The Fair Labor Standards Act Did Not Affect the Ownership of the Tips So as to Make Them the Property of Respondent.

Judge Sibley, writing the majority opinion of the Circuit Court of Appeals, avoids the accounting and guarantee notice almost entirely. We believe he did so because after admitting that the tips belonged to the redcaps before October 24, 1938, if he should base respondent's title to the tips on the notice, he would have to find some act of the redcaps by which they agreed to transfer the tips from themselves to respondent. This he apparently could not do in view of the trial court's finding that there was no meeting of the minds of the parties on the terms of the notice (33 F. Supp. 244, l. c. 248). He, therefore, found it necessary to rest his decision solely on the effect of the Fair Labor Standards Act itself, and not on any consent of the redcaps. He, therefore, said (R. 302), 118 F. (2d) 328:

> "The law had intervened to make the company owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously

were their compensation. * * * a collective agreement would not avail against changes wrought by a statute."

There is no basis for this holding of the Court in any provision of the Fair Labor Standards Act. The act does not deal with the subject of tips. It merely requires every employer subject to the act to pay each of his employees wages at the minimum rates, and certainly Congress had no intention to affect any existing arrangement between employer and employees with respect to the ownership of tips. The reasoning of the Court of Appeals is to the effect that since the act imposed upon respondent the obligation to pay wages, the service rendered by the redcaps was rendered by respondent; that tips given to the redcaps were not gifts, but compensation for service, and that since the service was rendered by defendant, the tips belonged to the defendant. The trouble with this reasoning is that respondent imposed no charge for the service and prohibited the redcaps from soliciting tips, passengers were under no obligation to pay for the service, and the consideration of the moral obligation of the passengers based upon the supposed understanding that what they paid "was the meat and bread of the redcap" is clearly immaterial in view of the obligation of respondent under the act to pay the wages which Congress had determined to be the minimum necessary to enable the redcaps to buy their "meat and bread." Petitioner submits, therefore, that the ruling of the Court of Appeals in this case and in the Williams case, which attributes to the act the legal effect of changing the ownership of tips from the redcaps to respondent is not sound. If this is so, then the decision of the Court of Appeals must fall because it is based entirely on the proposition that the effect of the act was to vest absolute ownership of tips in the defendant without any agreement on the part of the redcaps.

III.

Under the Arrangement Existing When Respondent's Notice of October 22, 1938, Was Served on the Redcaps, They Had the Right to Retain All Tips Received. This Arrangement Was Never Changed Despite Respondent's Notice.

(a) **Because the Redcaps did not accept the plan, but on the contrary, protested against it, and the parties by their conduct thereafter recognized that there had never been a meeting of the minds thereon.**

Although the opinion of the Circuit Court of Appeals is based on the proposition that by force of the Fair Labor Standards Act itself, the redcaps' tips became the absolute property of respondent, so that the Court apparently did not find it necessary to discuss the question as to whether any agreement was or could be made between the redcaps and respondent affecting the ownership of tips, nevertheless in view of the Court's statement in the Jacksonville Terminal case that "the notice given the redcaps was sufficient to make his receipts the money of the employer" (118 F. [2] 326), we deem it necessary to state briefly why we believe the Court erred in so holding.

If the tips, absent any agreement to the contrary, were the property of the redcaps, as petitioner contends, and if the Fair Labor Standards Act did not effect any change in this ownership, then obviously some agreement between respondent and the redcaps was necessary to vest the ownership of the tips in respondent, so that the retention of these tips constituted payment of wages by defendant. Petitioner contends that in view of the protest made by the redcaps by their duly designated representative two days after receipt of respondent's notice of October 22, 1938, and the other facts and circumstances showing that

there was never any meeting of the minds of the redcaps and respondent on the terms of the notice, the notice was ineffectual to make any change in the existing arrangement under which the tips were the property of the redcaps. For the sake of brevity petitioner will not elaborate on this contention, as the point is well covered in the opinion of Judge Atwell (R. 286-288), 33 F. Supp., l. c. 247, 248.

(b) **Because respondent could not by its unilateral action effect a change in the arrangement in view of the redcaps' previous designation of a representative for collective bargaining purposes, and request for a conference to negotiate a collective agreement under the Railway Labor Act.**

In addition to the fact that there was no meeting of the minds of the parties on respondent's notice of October 22, 1938, so as to change the existing arrangement under which the redcaps had the right to retain their tips, petitioner contends that under Section 2 of the Railway Labor Act this notice was ineffectual to change the existing arrangement after the redcaps had organized; had by a majority vote selected and designated a bargaining representative; had so informed respondent, and had requested a conference for the purpose of making an agreement with respect to wages and working conditions. They so designated petitioner herein as their representative on October 11, 1938 (R. 139). On the same day petitioner requested a conference for the purpose of negotiating an agreement covering the working conditions of the redcaps (R. 142). This was eleven days before defendant's so-called accounting and guarantee notice was served on the individual redcaps by respondent. Under these circumstances it was the duty of respondent under the Railway Labor Act "to exert every reasonable effort to make * * *" an agreement

"covering rates of pay, rules and working conditions," and it was without authority to take unilateral action to prescribe wages and working conditions until such efforts as commanded by the Railway Labor Act had been made. Section 2 of the Railway Labor Act, upon which petitioner relies, U. S. C. A., Title 45, Section 152, provides:

> General duties. First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents and employees **to exert every reasonable effort to make** and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and employees thereof.
>
> Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, **in conference between representatives designated** and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute. (Emphasis added.)

In the Virginian Railway case this Court held squarely that it is the mandatory duty of a carrier employer to treat with the duly authorized representative of the employees for the purpose of making, if possible, a collectively bargained agreement. Virginian Railway Company v. System Federation, No. 40, 300 U. S. 515, 81 L. Ed. 789.

Unless the Railway Labor Act is without substance and meaning, it became the clear, plain and inescapable duty of respondent to "exert every reasonable effort" to make an agreement "concerning rates of pay, rules and working conditions." Instead of pursuing the course commanded by the law, it flouted the law and undertook by unilateral

declaration to prescribe the wages and working conditions. This it had no right to do for this plain reason: Implicit in the language prescribing the duty to exert every reasonable effort to negotiate an agreement with respect to wages and working conditions, is the denial of the right of the carrier-employer to fix them by unilateral declaration. This must be so if the Railway Labor Act is to accomplish its purposes. Such acts as respondent was guilty of in this case are the very things which through the years engendered and brought on labor controversies resulting in strikes and in the interruption of commerce, and which provided the reason and factual support for the Railway Labor Act. There was a day when the carrier could by its own fiat dictate wages and working conditions without negotiating with employees, but that day ended with the enactment of the Railway Labor Act.

The redcaps were likewise, by command of the Railway Labor Act, under the obligation to exert every reasonable effort to make an agreement by negotiation with respondent. They were commanded when wages and working conditions were to be considered, or a dispute arose, to stick to their posts and permit the stream of commerce to flow, and negotiate. When respondent served its notice (instead of pursuing the course commanded by the law), the redcaps turned the whole matter over to petitioner, their previously authorized representative, and replied through him, thus asserting their willingness and readiness to deal through him as their collective bargaining agent. Petitioner protested the action of respondent on October 24, 1938 (R. 128). This left the action of the employer unagreed to. There was, as Judge Atwell found, no meeting of the minds.

The situation then was in this posture: The employees stood ready and willing to negotiate—urging negotiations,

in fact. Respondent stood on its unilateral declaration and failed to make any reasonable effort to make an agreement.

The employees continued in their jobs, as it was their duty to do, all the while keeping their protest alive and likewise their readiness and willingness to negotiate. They preserved peace in the industry by complying with the demand of the employer for reports of tips received. They accepted payment of part of their wages from their employer, to which they were clearly entitled under the law. Meanwhile, as we have said, they kept their protests and invitation to negotiate alive. There is nothing in all this which can be construed into an acceptance of the notice as binding on the employees.

The first six paragraphs of Section 2 of the Railway Labor Act (U. S. C. A., Title 45, Section 152) embodies provisions dealing with the **making** of agreements. They command every reasonable effort to **make** agreements. They safeguard the employees in organizing and selecting representatives. They proscribe attempts of the employers to influence or coerce employees in the exercise of these rights.

And here let us say that there could be few more effective ways for an employer to coerce employees into abandoning their organization or their representative than by committing such acts as respondent committed in this case. A carrier, when confronted with negotiations, could easily take such unilateral action as would place the employees at a great disadvantage in their efforts to bargain collectively. Under these circumstances, who can deny that it was the clear intent of the Railway Labor Act that wages and working conditions can be changed by an employer only after he has fully complied with the law, and has made every reasonable effort to make an agreement by negotiation with the duly authorized representative of the men?

The language of Mr. Justice Swayne, in Smythe v. Fiske, 23 Wall. 374, 380, 23 Law. Ed. 47, 49, is especially applicable here:

> "A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

The intent of the lawmaker, as set forth in the first section of the Railway Labor Act, was to enact a law which would tend to prevent labor controversies and interruptions of commerce. With that intent in mind, who can say that it would not be sheer mockery to leave out of the law the denial of the right of an employer to fix wages and working conditions without first exerting every reasonable effort to make an agreement with respect to them by negotiation with the employees?

We submit that we have here conclusively established (a) there was no agreement between the employer and the employees to change the working arrangements existing at and prior to the enactment of the Fair Labor Standards Act, and (b) that the carrier-employer was without authority to change it by unilateral declaration without first exerting every reasonable effort to make an agreement, and that no such effort was made.

Under the arrangement existing, tips were considered by both the employees and the employer as the property of the employees, and no change was ever made in this arrangement in spite of respondent's notice.

IV.

Respondent by Its Notice of October 22, 1938, Did Not Claim Ownership of the Redcaps' Tips. The Notice Was Merely an Assertion by Respondent of Its Opinion That Tips Were Wages Under the Fair Labor Standards Act, and That It Was Only Bound to Make up the Difference Between the Tips Received and the Minimum Wages Earned.

The Circuit Court of Appeals in the Jacksonville Terminal case, followed in the case at bar, held that respondent's notice to the redcaps was sufficient to make the tips received by them the money of respondent. We submit that a careful analysis of the notice (R. 127) does not support this statement.

In substance this notice simply amounts to a statement by defendant which might be phrased as follows:

> "Under the Fair Labor Standards Act we are required to pay you a minimum wage. This wage will be paid you by passengers who give you tips. You will inform us as to the amount of these tips, and if the passengers do not pay you sufficient tips to secure the minimum wage, we will pay you the difference,"

or perhaps it might be stated as follows:

> "You are privileged to retain your tips as you have always done, but with this difference: We will credit the amount of said tips against the minimum wage which the law requires us to pay you, and if you do not receive sufficient tips to secure the minimum wage, we will make up the difference."

There is nothing in the notice stating that the men must turn over their tips. On the contrary, the notice specifically states that the men are privileged to retain their tips. The only limitation, in effect, sought to be made on this privilege was that the men must consider these tips as

part payment of wages so that the defendant would only have to make up the difference between the tips and the minimum wage. Thus, in the final analysis, the accounting and guarantee arrangement devised by the railroads to evade their liability under the Fair Labor Standards Act is an attempt by them to write into the act a provision under which tips received from passengers are to be considered as wages paid by the railroads. Respondent, of course, will say that this is not its effect, contending that the arrangement provides for the turning over of tips by the men to the amount of the minimum wage. The notice does not, however, as we have pointed out, so provide. Stated briefly, the notice is to the effect that "the carrier * * * guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided (that is, as tips) will not be less than the minimum wage provided by law," and that the men are "privileged to retain, subject to their being credited on such guarantee, all such tips or remuneration * * * except such portion thereof as may be required * * * for taxes." There is not a single word in the notice about the men turning over their tips. The notice merely stated that the carrier guarantees that the amount of tips reported, plus the sum paid by the defendant, will not be less than the minimum wage. In other words, defendant was merely expressing its opinion and belief that tips are wages which could be considered as received in partial discharge of the minimum wage required to be paid by the act.

V.

The Accounting and Guarantee Plan Is Not a Compliance With the Fair Labor Standards Act, Because It Does Not Carry Out the Purposes of Congress Since (A) It Permits of Easy Evasion of the Obligations Imposed Thereby, (B) It Shifts the Burden of Keeping Records From the Employer to the Employee in Violation of Section 11 (c) of the Act, and (C) It Is Conducive to Labor Disputes Burdening and Obstructing Commerce.

Petitioner further contends that even if the accounting and guarantee plan did become a part of the employment contract of the redcaps, nevertheless the plan was not a compliance with the Fair Labor Standards Act, because it will not carry out the purposes of the act as expressed by Congress in section 2 thereof (U. S. C. A., Title 29, Section 202). On the contrary, the purposes of the act will be defeated if the accounting and guarantee plan is held to be a compliance with the act.

Section 11 (c) of the Fair Labor Standards Act [U. S. C. A., Title 29, Section 211 (c)] requires every employer subject to the act to make and keep such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him as may be necessary or appropriate for the enforcement of the provisions of the act.

The so-called accounting and guarantee system is subject to serious abuse, a factor which is properly considered in determining whether Congress intended that such system might fulfill the statutory purpose. The records which the employer is required to make and preserve under section 11 (c) of the act are essential in order to determine whether the act is being violated. Respondent required the redcaps to report the tips received by them and adopted and relied upon such reports in determining whether it owed

the redcaps anything on account of its guarantee. Under such a plan no provision was made for determining how much the employees actually received in tips. The redcap can report without effective check by the administrator or the employer the receipt of any sum whatsoever. If he feels it necessary to report the receipt of tips equal to or nearly equal to the minimum wage because of the fear that he may otherwise lose his job as an inefficient employee, he can do so, even though he received much less. This scheme, therefore, permits easy evasion of the minimum wage provisions of the act, and the provisions requiring that true and accurate wage records be made and kept.

The record shows (R. 131) that respondent only required the redcaps to report their tips from October 24, 1938, through February 28, 1939, and that they did not report their tips from March 1, 1939, through October 15, 1939. They again reported their tips from October 16, 1939, through March 6, 1940. During the period from March 1, 1939, through October 15, 1939, respondent kept no records whatsoever of the amount of tips received by the redcaps, and clearly violated the record-keeping requirements of the act. This violation is not, of course, directly involved in this suit, but it does illustrate the light-hearted manner in which respondent treated its obligation under the act, and the fact that the accounting and guarantee plan is an entirely inadequate substitute for the mandatory provisions of the act that **every employer shall pay wages.** Even if the accounting and guarantee plan is a compliance with the act, respondent could not carry out the terms thereof unless the redcaps reported daily the amount of their tips.

The purpose of Congress to prevent labor disputes burdening and obstructing commerce, and the free flow of goods in commerce, intended to be carried out by the requirement that the employer pay a decent minimum wage

to his employees, is not effectuated by the accounting and guarantee plan. In fact, it is obvious that this plan is apt to lead to serious labor disputes and to dissatisfaction on the part of those employees who are working under the plan. The dissatisfaction of the redcaps with this system is evidenced by the filing of this suit and other similar suits to which we have referred. A redcap who fails to earn the minimum per hour in tips becomes an unnecessary expense to his employer, and the employer can, for legitimate business reasons, discharge him. Redcaps who are unable to produce, and are fearful of probable discharge, will in all likelihood falsify their reports to indicate an income of at least the minimum per hour. This will create a situation which encourages dishonesty, and at the same time contravenes the fundamental provisions of the act in that such a man will be forced to subsist upon less than the minimum prescribed by the act. It will only be natural for the railroads to check up on the men and spy on them if they report a smaller amount in tips than the minimum wage. This will engender suspicion, bitterness and strife, and a system of checking, or even espionage will be inaugurated. The act will thus increase rather than decrease conditions which are detrimental to the "general well-being" of the redcap, and will lead to "labor disputes burdening and obstructing commerce, and the free flow of goods in commerce."

We submit that it is evident that Congress could not have had in mind permitting any such arrangement as the accounting and guarantee plan devised by the railroads to evade the duty imposed upon them by the act to pay their employees wages. The law is plain; it says every employer shall pay each of his employees who is engaged in commerce wages at the minimum rates, and, since it is plain, there is no occasion for construction. United States v. Missouri Pacific Railroad Company, 49 Sup. Ct. 133, 278

U. S. 269, 72 L. Ed. 322; Russell Motor Car Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778; Albert and J. M. Anderson Manufacturing Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778. Since Congress has said that a payment of wages by the employer shall be the means of effectuating the purposes of the act rather than some other method which might to the Court in a particular case appear just as good, no employer and no court may substitute its judgment for that of Congress.

VI.

Tips Received by the Redcaps Were Not Payment of Wages by Respondent as Required by the Fair Labor Standards Act. The Judgment of the Circuit Court of Appeals Reversing the Judgment of the District Court in Favor of the Redcaps Is, Therefore, Erroneous.

If petitioner is correct in his assertion that the tips received by the redcaps during the period here involved were their property, and did not become the property of respondent by virtue of the Fair Labor Standards Act, or by any agreement between the redcaps and respondent, the question remaining is whether the tips received from passengers were, even though the redcaps' property, payment of wages under the act. Since the Circuit Court of Appeals did not base its decision on the ground that tips were wages, but rather on the ground that the tips were the property of the respondent which could be used for the payment of wages, we will not lengthen this brief by a further discussion of this point since we believe this question has been definitely answered in the negative by Judge Atwell in this case (R. 290), and by Judge Otis in the case of Harrison v. Kansas City Terminal Railway Company, 36 F. Supp. 434, l. c. 437.

Petitioner, therefore, respectfully submits that the tips were the property of the redcaps; that no change in the ownership of the tips was made by defendant's notice of October 22, 1938, or by the Fair Labor Standards Act; that tips given by passengers to redcaps are not payment of wages by respondent, and that consequently, petitioner is entitled to recover, and he, therefore, prays that this Court issue its writ of certiorari so that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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